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AMERICA'S UNIONS

**American Federation
of Labor and
Congress of Industrial
Organizations**

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202-637-5000
www.aflcio.org

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October 31, 2016

Mr. Brent J Fields, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

***Re: File Number S7-18-16 -- Request for Comment on Subpart 400
of Regulation S-K***

Dear Mr. Fields:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I am writing to provide comments on the Securities and Exchange Commission's request for comment on Subpart 400 of Regulation S-K. The AFL-CIO is the umbrella federation for U.S. labor unions, including 56 unions representing 12.5 million members. Union-sponsored and Taft-Hartley pension and employee benefit plans hold more than \$646 billion in assets. Union members also participate directly in the capital markets as individual investors and as participants in single-employer and public pension plans.

We understand that the Commission is seeking comments on Regulation S-K Subpart 400 in connection with the Commission's Disclosure Effectiveness Initiative and its obligations under Section 72003 of the Fixing America's Surface Transportation Act. To this end, we direct the Commission's staff to the AFL-CIO's previously submitted comments on the Commission's Disclosure Effectiveness Initiative. Please find enclosed the AFL-CIO's previously submitted comment letters on Disclosure Update and Simplification and Business and Financial Disclosure Required by Regulation S-K.

We also direct your attention to the AFL-CIO's comment letters on the Commission's proposed rulemakings on executive compensation. Enclosed please find the AFL-CIO's previously submitted comments on Incentive-Based Compensation Arrangements, Listing Standards for Recovery of Erroneously Awarded Compensation, and Pay Versus Performance. These proposed rulemakings apply to the executive compensation disclosure requirements contained in Item

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402 of Regulation S-K. In our view, final action on these required rulemakings under the Dodd-Frank Act should be given priority over any other contemplated revisions to Regulation S-K.

We appreciate the opportunity to comment on Subpart 400 of Regulation S-K. If the AFL-CIO can be of further assistance, please contact Brandon Rees at Brees@aflcio.org or 202-637-5152.

Sincerely,

A handwritten signature in black ink, appearing to read 'HSC', with a stylized flourish at the end.

Heather Slavkin Corzo, Director
Office of Investment

HSC/sdw
opeiu #2, aflcio

Enclosures



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October 31, 2016

Mr. Brent J Fields, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Dear Mr. Fields:

Re: File Number S7-15-16 -- Disclosure Update and Simplification

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), and Americans for Financial Reform (AFR), I am writing provide comments on the Securities and Exchange Commission's proposed rule titled "Disclosure Update and Simplification." For the reasons below, we urge the Commission to withdraw the proposed rule and reconsider its provisions to ensure that any changes to the Commission's disclosure rules do not narrow the scope of information that is provided to investors.

The AFL-CIO is the umbrella federation for U.S. labor unions, including 56 unions representing 12.5 million members. Union-sponsored and Taft-Hartley pension and employee benefit plans hold more than \$646 billion in assets. Union members also participate directly in the capital markets as individual investors and as participants in single-employer and public pension plans. AFR is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry. AFR includes consumer, civil rights, investor, retiree, community, labor, faith based, and business groups.¹

If adopted, the Commission's proposed rule will eliminate certain disclosure requirements that purportedly are redundant, overlapping, outdated or superseded by other disclosure requirements. As a general matter, we note that repetitive disclosures are not a significant concern for investors. Investors focus on disclosures that they believe are material. But because investment strategies differ, investors will disagree on which disclosures are material. On the other hand, it will be

¹ A list of AFR member organizations is available at <http://ourfinancialsecurity.org/about/our-coalition/>.

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of great concern to investors if material information is no longer disclosed. The overwhelming consensus of investors is that more information should be disclosed, not less.²

While the proposed rule is presented as a technical revision to the Commission's disclosure requirements, we are concerned that such revisions may have unintended consequences. In particular, we are concerned that eliminating Commission disclosure rules because they are duplicated by Financial Accounting Standards Board ("FASB") requirements will lead to less disclosure. FASB has proposed to redefine its definition of materiality according to a narrow legal standard, and this definitional change will result in a reduction in the overall level of disclosure that will be required under U.S. GAAP.

Specifically, FASB proposes to redefine materiality as a legal concept as stated by the U.S. Supreme Court's antifraud definition of materiality. FASB's proposed definition shifts the determination of material information that "could influence decisions that users make" to a "substantial likelihood" that the disclosure will "significantly alter the total mix of information." This legal definition sets the minimum floor for disclosure to avoid committing fraud; it should not be used as a guide for identifying the optimal amount of required disclosure. A copy of the AFL-CIO's comment letter to FASB detailing our opposition to this proposed change is attached.³

Legal and regulatory proceedings in particular are of great interest to investors because they can significantly impact a company's business model in ways that go far beyond the materiality of any contingent monetary liabilities. For example, the dollar amount of the Wells Fargo \$185 million settlement with the CFPB for the alleged systematic opening of fraudulent accounts may not have been material to investors. But the existence of such a regulatory proceeding had material implications for Wells Fargo's cross-selling business strategy as evidenced by Wells Fargo's subsequent stock market value drop by almost \$20 billion after the settlement was announced.

In our view, neither Regulation S-K Item 103 nor U.S. GAAP require the disclosure of sufficient information on pending legal and regulatory proceedings. To help

² See *e.g.* Letter from SEC Investor Advisory Committee to the Division of Corporation Finance, Securities and Exchange Commission (June 15, 2016), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-approved-letter-reg-sk-comment-letter-062016.pdf> ("While recognizing substantial opportunities for improvement, the IAC is of the view that the current degree, quality and frequency of disclosure for U.S. issuers overall is appropriate and a source of strength for the U.S. capital markets.").

³ Letter from Heather Slavkin Corzo, Office of Investment Director, AFL-CIO to Susan Cosper, Technical Director, Financial Accounting Standards Board (December 7, 2015), available at http://www.aflcio.org/content/download/175390/4167006/FASB_letter_on_Conceptual_Framework_for_Financial_Reporting_12-7-15.pdf.

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remedy this information deficiency, we support the greater use of bright line disclosure rules such as those required by Item 103 for environmental matters. We also favor preserving Item 103's disclosure requirements for low-probability but high magnitude liabilities because these contingencies are significant risk factors for investors. Finally, disclosure of the venue, parties, and date of material legal proceedings is necessary to enable investors to conduct their own independent research.

We also believe that investors need more detailed disclosure of corporate income tax liabilities, not less. We support the incremental disclosure that Regulation S-X Rule 4-08(h) provides in addition to the U.S. GAAP requirements, including disclosure of the amount of domestic and foreign pre-tax income and income tax expense. In addition, investors would benefit from requiring the disaggregation of foreign amounts of income tax paid and the effective tax rate on a country-by-country basis. Enhanced disclosure of foreign tax liabilities on a country-by-country basis will allow investors to better assess the tax avoidance strategies employed by multinational companies.

The elimination of purportedly outdated or superseded rules also risks reducing disclosure. For example, the proposed rule will eliminate the equity compensation plan information table that is required under Regulation S-K Item 201(d). While the stock exchanges now require that all equity compensation plans be approved by shareholders, we note that this table also requires disclosure of the number of shares available for future issuance. This information on a company's equity compensation plan burn rate and remaining runway is material for shareholders. Moreover, eliminating proxy statement disclosure that is also contained in the financial statement notes will make this information less prominent for investors when casting proxy votes.

Finally, we are concerned that the Commission's proposed rulemaking contemplates the elimination of various bright line disclosure rules. For example, the Commission proposes eliminating bright line rules for the separate reporting of repurchase agreements, disclosure of material restrictions on dividends, and the names of major customers. We caution that eliminating bright line rules in favor of a more principles-based disclosure requirement will diminish comparability of companies who may decide differently as to whether and how information must be disclosed. For this reason, disclosure requirements should include bright line rules where appropriate.

For these reasons, we urge the Commission to withdraw the proposed rule for further review. The Commission should carefully study the economic impacts on investors before moving forward with any rulemaking to eliminate existing disclosure rules. We share Commissioner Kara Stein's concern that the technical subject matter of the proposed rule "fails to provide a bonafide opportunity for a wide variety of

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commenters to truly access and understand what is being proposed.”⁴ We also question the value of moving forward with this rulemaking at a time that there are still outstanding investor protection rules that are required to be adopted by the Dodd-Frank Act. Finally, promulgating this proposed rule before reviewing the comments on the Commission’s Concept Release concerning Reg S-K and disclosure raises questions as to the Commission’s commitment to full transparency and public consultation on these issues.

We appreciate the opportunity to comment on this proposed rulemaking. If we can be of further assistance, please contact Brandon Rees at (202) 637-5152.

Sincerely,



Heather Slavkin Corzo, Director
Office of Investment



Marcus Stanley, Policy Director
Americans for Financial Reform

HSC/sdw
opeiu #2, afl-cio

Enclosure

⁴ Statement on the Disclosure Update and Simplification Proposing Release, Kara Stein, Commissioner, Securities and Exchange Commission (July 13, 2016), available at <https://www.sec.gov/news/statement/stein-statement-open-meeting-071316-disclosure-update.html>.

American Federation of Labor and Congress of Industrial Organizations



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Lawrence J. Hanley
Sean McGarvey
D. Taylor
Bhairavi Desai
Harry Lombardo
Sara Nelson
Eric Dean

December 7, 2015

Sent via electronic mail: director@fasb.org

Ms. Susan M. Cospers
Technical Director
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

Re: File Reference No. 2015-300 on Conceptual Framework for Financial Reporting and No. 2015-310 on Notes to Financial Statements (Topic 235)

Dear Ms. Cospers:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I am writing to comment on the Financial Accounting Standards Board's ("FASB") Exposure Drafts on Conceptual Framework for Financial Reporting ("Conceptual Framework"), and Notes to Financial Statements (Topic 235) ("Notes"), on materiality, dated September 24, 2015. We are deeply troubled by FASB's proposals to redefine materiality and we believe the proposals should be withdrawn.

The AFL-CIO is the umbrella federation for U.S. labor unions, including 56 unions representing 12.5 million union members. Union-sponsored and Taft-Hartley pension plans hold \$587 billion in assets. Union members also participate directly in the capital markets as individual investors and as participants in pension plans sponsored by corporate and public-sector employers. The retirement savings of America's working families depend, in part, on companies making effective disclosures to investors.

The existing FASB definition of materiality states that "Information is material if omitting it or misstating it could influence decisions that users make on the basis of the financial information of a specific reporting entity." (Chapter 3, *Qualitative Characteristics of Useful Financial Information*, FASB Concepts Statement No. 8). In the Conceptual Framework, FASB proposes to replace this definition to state:

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Materiality is a legal concept. In the United States, a legal concept may be established or changed through legislative, executive or judicial action.

In the Conceptual Framework, FASB observes the U.S. Supreme Court's antifraud definition of materiality — "information is material if there is a substantial likelihood that the omitted or misstated item would have been viewed by a reasonable resource provider as having significantly altered the total mix of information."

In the Notes exposure draft, FASB explains that adopting a legal definition of materiality is intended to "improve the effectiveness of disclosures in the notes to financial statements." Specifically, FASB states the new definition of materiality would promote "discretion," and could reduce or eliminate "irrelevant disclosures." The notes to the financial statements provide important context for the numbers provided by companies in their financial statements, so any changes to the definition of materiality for notes disclosure will have a major impact on financial reporting.

We strongly oppose redefining materiality based on a legal definition rather than as an accounting concept that has long been familiar to investors. A legal definition of materiality will unacceptably narrow the amount of information that is required to be disclosed. The proposed legal definition shifts the determination of materiality from information that "could influence decisions that users make" to a "substantial likelihood" that the disclosure will "significantly alter the total mix of information." In other words, information that could influence the decisions of investors would no longer need to be disclosed unless it has a high probability of having a significant impact.

We are also concerned that the proposed legal definition of materiality will insert the subjective opinions of attorneys into the disclosure decision-making process. At present, the preparers of financial statements and their auditors determine whether information is material and should be disclosed. In close questions of whether information is material, the current definition of materiality encourages disclosure. Under the new standard, lawyers will be the ultimate arbiters of what must be included in financial statements. Accordingly, the definition of materiality will be subject to significant uncertainty given that different courts may issue varying decisions.

In our opinion, the proposed legal definition of materiality appears intended to benefit the preparers of financial statements without regard for the costs imposed on the users of financial statements. If adopted, financial statement preparers will have far greater latitude to avoid making disclosures. They may cherry pick the information they choose to disclose, opting to disclose favorable information, while omitting information which may be unfavorable. Providing less information in financial statements does not make the remaining disclosure more effective. To the contrary, investors are clamoring for more, not less, information in financial statements.

Ms. Susan M. Cospers
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We are troubled by the manner in which FASB prepared the exposure drafts, apparently without seeking input from investors. FASB has stated that the proposals originated from the concerns of unidentified "stakeholders." According to FASB's website, it does not appear that FASB's own Investor Advisory Committee has met in recent years. We also note that FASB's Investor Advisory Committee does not include any representatives of beneficial asset owners such as pension plans. At a minimum, FASB should slow down and set up a panel of investors to solicit their views.

In conclusion, we urge FASB to withdraw the proposals and seek more input from users of financial statements. Thank you for taking the AFL-CIO's views into consideration regarding this matter. If the AFL-CIO can be of further assistance, please contact Brandon Rees at (202) 637-5152 or brees@aficio.org.

Sincerely,

A handwritten signature in black ink, appearing to read "HSC", is written over a light gray rectangular background.

Heather Slavkin Corzo, Director
Office of Investment

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July 21, 2016

Mr. Brent J Fields, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

**Re: File Number S7-06-16, Release Nos. 33-10064, 34-77599
Business and Financial Disclosure Required by Regulation S-K**

Dear Mr. Fields,

I am writing to you today on behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO") to provide comments on the Concept Release regarding Business and Financial Disclosure Required by Regulation S-K (Release Numbers 33-10064, 34-77599, the "Release") issued by the Securities and Exchange Commission (the "Commission" or the "SEC") earlier this year. We appreciate the opportunity to add to our previous comments¹ on this important topic and echo the importance of disclosure and the need to protect investors' access to information.

The AFL-CIO is the umbrella federation for U.S. labor unions, including 56 unions, representing 12.5 million union members. Union-sponsored and Taft-Hartley pension and benefit plans hold more than \$647 billion in assets. Union members also participate in the capital markets as individual investors and as participants in pension plans sponsored by corporate and public-sector employers. Our members, like many American working families whose retirement savings are invested in the financial markets, share deep exposure to U.S. capital markets and accordingly have a serious interest in the form and content of corporate disclosures.

The SEC's mandate calls on it to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.² Yet today there is a significant trust deficit between investors and their financial

¹ Letter to SEC re: Comments on Disclosure Effectiveness Initiative (November 20, 2015). Available at: <https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-65.pdf>

² Securities and Exchange Commission, "What We Do" Available at: <https://www.sec.gov/about/whatwedo.shtml>

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service providers, especially among retail investors.³ As the federal agency dedicated to investor protection, the SEC must help to restore investor confidence by improving investors interactions with the financial markets. This can, and must, be achieved through better disclosure, enforcement and prevention of abuse.

The Securities Act of 1933 and the Securities Exchange Act of 1934 form the statutory foundation of our capital markets regulation in large part by imposing reporting obligations on issuers. This mandatory reporting is a primary tool by which the government is able to monitor and manage market actors and provides a principal source of liability and enforcement authority. Likewise, it provides the basis on which we as investors are able to make informed investment decisions. The theoretical underpinnings of our economic system depend on investors receiving and utilizing that information when making our investment decisions.

In a disclosure-based regime such as this, quality, quantity and form of disclosure are paramount in establishing its efficacy. Broad-based disclosure can also improve transparency, combat short-termism and build public trust, confidence and understanding of capital markets. Thus this review process provides an opportunity for the Commission to better fulfill each of its mandates. [Q23]

We urge the SEC to consider and incorporate the ideas and specific areas of disclosure discussed below, leverage the full power of available technology to facilitate reporting and access to information, resist efforts to reduce disclosures and redouble its commitment to the protection of investors and to the efficient and productive operation of our capital markets. For all of these reasons, we respectfully submit the following recommendations.

I. Disclosure is of paramount importance as a tool for investor protection, corporate transparency and the fair and orderly operations of our markets.

Most investors come to the market with a considerable informational disadvantage, left to rely on public information and what the company discloses directly. Corporate reporting mandated by federal securities laws is the most important source of information on which we base our investing and proxy voting decisions. Mandatory corporate reporting also largely defines the data set available in the full market ecosystem and, as such, plays a crucial role in a variety of market and social functions. This review process should be used to identify and further reduce informational

³ CFA Institute & Edelman, "Investor Trust Study" (2013) Available at: https://www.cfainstitute.org/learning/future/getinvolved/Documents/cfa_institute_edelman_investor_trust_study.pdf

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asymmetries to enable better investing decisions and improve the overall health and stability of our financial markets. [Q23]⁴

A. Disclosure for Whom?

First, the notion that effective disclosure should only be designed for one subset of investors is not supported by common sense, good policy or the law. Many of the prompts in the Release asked about what level of investor sophistication disclosures should be designed for; however, capital markets are public and invite the participation of every type of investor. To protect the full range of investors the Commission should focus, as suggested in the statement submitted by the SEC Investor Advisory Committee (the "IAC"), on retail investors.⁵ We are not concerned about excessive disclosure and believe that the effective use of layering, cross-referencing and the like can help any investor easily navigate large amounts of information.⁶ By ensuring the least sophisticated investors have the information they need and leveraging effective new methods of accessing, formatting and displaying information the Commission can ensure that all investors, and indeed the market itself, is protected. [Q14, Q16]

Second, the process of price discovery is a complex and essential function in our financial ecosystem on which all market participants rely. To fulfill its mandate of investor protection (as well as its other mandates) through provision of information, the SEC must require disclosure designed for the full range of actors in the financial markets, including investors, academics, analysts, media, and any other party that interacts with disclosure data to enable and support price discovery. Importantly, the effectiveness of various disclosures does *not* depend on every investor reading every piece of information disclosed. Minutia that may be noticed by only a few analysts may nonetheless enter the public discourse by means of that analyst and their reports or publications. [Q17, Q19, Q20, Q23]

Third, our members engage in capital markets significantly through their pension plans. Pensions, with investing horizons that can extend for a generation, have among the strongest mandates for long-term investing. It's clear from practice and outcomes,

⁴ Please note, to facilitate navigating this comment we have included reference to the numbered requests for information as [Q#]; however, these notations are not comprehensive and the comment may be responsive to more questions than are identified by those notations.

⁵ Investor Advisory Committee letter to the SEC "Re: File No. S7-06-16, Release No. 33-10064, Disclosure Effectiveness" (June 15, 2016), p.2. ("IAC letter") Available at: <https://www.sec.gov/comments/s7-06-16/s70616-22.pdf>.

⁶ Note, however, that any investor still receiving hard copy disclosure must receive all referenced information. Additionally, any information incorporated by reference or cross-referenced should be treated as "filed with the SEC" for legal and liability purposes.

Mr. Brent J Fields, Secretary
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however, that long-term investing strategies are not supported or incentivized by our system. While there are myriad root causes, the disclosure system offers a real opportunity to shift these dynamics. As the adage goes, “what gets measured gets managed.” Excessive focus on short-term performance metrics naturally subordinates longer-term performance and overall financial stability to the detriment of nearly all investors. By including more and better measures of long-term performance, including several discussed below, the SEC can enable us as investors to support and reward long-term value creation and avoid investments that carry hidden risks or create systemic risks.

To be clear, we are not suggesting that quarterly data is not necessary – quite the opposite. Quarterly reporting is vital to identifying trends in these longer-term performance metrics over time. A single annual report would provide far too little information to build a reliable picture of companies’ operations. It could also lead to excessive volatility around annual performance reporting as investors, blind-sided by unexpected annual results, rebalance their portfolios in response to unexpected performance reports. Thus quarterly reporting is essential to long-term investing strategies and must be maintained, likely with additional long-term performance metrics such as those discussed throughout this comment. [Q278, Q282, Q283]

B. No Information Overload

Although much has been made of “information overload” there is no problem with excessive disclosure.⁷ We do not believe any investors are worse off for access to too much information. Conversely, we believe that additional disclosures tend to provide useful information. The problems with unwieldy corporate reporting lie in the form and style of the disclosure. There is absolutely no need to eliminate data useful to one class of investor for the sake of unburdening issuers. The SEC’s mandate is to protect investors, *not* avoid inconveniencing issuers. [Q9, Q16]

The risks of removing potentially important information are significant. It could put uninformed investors at risk, exclude investors from the market entirely for lack of information, disrupt the price discovery process, diminish transparency and confidence in the markets, and increase systemic risk. [Q14, Q15, Q16, Q28]

⁷ CFA Institute, “Financial Reporting Disclosures: Investor Perspectives on Transparency, Trust and Volume,” (2013), p.8. Available at: <https://www.cfainstitute.org/ethics/Documents/investor-perspectives-on-disclosures.pdf>; see also EY, “Disclosure Effectiveness: What Investors, Company Executives and Other Stakeholders Are Saying,” (November 2014), p.2. Available at: [http://www.ey.com/Publication/vwLUAssets/EY-disclosure-effectiveness-november-2014/\\$FILE/EY-disclosure-effectiveness-november-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY-disclosure-effectiveness-november-2014/$FILE/EY-disclosure-effectiveness-november-2014.pdf)

Furthermore, there is already a legal requirement that disclosures be made in “plain English” that requires information disclosed to be presented in a “clear, concise, and understandable manner”.⁸ All investors would be better served if that requirement was more strictly enforced and closely adhered to and if excessive boilerplate disclosures were addressed so that company-specific risks and information were easier to identify.

There are plenty of possible solutions to the barrage of boilerplate language that bury the useful and unique detailed disclosure that help investors differentiate between potential investments. Item 305, the Quantitative and Qualitative Disclosures about Market Risk, in particular should be required to be tailored to the specific, unique attributes of the business. [Q16, Q149, Q153, Q145-53, Q168]

C. Need for Ongoing Feedback

Engaging with investors and other users of corporate reporting on an ongoing basis would enable the Commission to better understand and manage how corporate reporting works and doesn't work. This could be achieved through instituting a formal system to solicit feedback from users and encouraging those users to raise issues as they occur in real time, as suggested by the Investor Advisory Committee (“IAC”).⁹ Such a system could also address investor demand for new information on an ongoing basis, as in the case of political spending disclosure. The Commission should also conduct more direct outreach, engagement, focus groups and testing. The “Know Before You Owe” project described below provides a good model. [Q18]

D. Robust Process Required Before Removing Information

We believe any reduction in information available to investors, on the other hand, presents serious threats to investor protection, confidence in our public markets, and the health of our financial system. Because of this, we believe a public notice and comment period is inadequate review for any proposal to reduce required corporate disclosures. Instead we believe there must be a robust process of review before any information is removed. [Q18, Q60, Q79, Q151, Q183, Q191, Q197]

Such a robust process would include testing of new methods and styles of reporting, focus groups on their effectiveness, and independent research and analysis into the market impacts of any changes. Multiple independent focus groups should be assembled to address the various and particular needs of different investor groups, e.g.

⁸ 17 CFR 230.421 - Presentation of information in prospectuses. Available at: <https://www.law.cornell.edu/cfr/text/17/230.421>.

⁹ IAC letter, p 9. Available at: <https://www.sec.gov/comments/s7-06-16/s70616-22.pdf>

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retail investors, institutional investors, analysts, etc. Micro- and macro-economic studies are also essential before the Commission moves to, in any way, reduce or eliminate the information available to investors through mandatory corporate reporting.

An example can be found in the “Know Before You Owe” project undertaken by the Consumer Financial Protection Bureau (the “CFPB” or the “Bureau”) conducted a review to develop new disclosure forms. That process engaged diverse stakeholders, tested alternatives and solicited feedback through multiple channels from multiple audiences over the course of years.¹⁰ It yielded a “statistically significant improvement” over the original forms.¹¹ The SEC has the ability to conduct a comparably robust review process before removing any information to achieve “statistically significant” results, and in our view, it must.

The risks associated with the potential removal of critical information do not exist when the consideration is about adding new information. As a result, we do not believe it would be appropriate for the SEC to require further studies and reporting when adopting new disclosure requirements. The Commission already struggles with limited resources and should not create additional demands on those resources when simply requiring additional information from issuers. [Q4]

The same rationale applies to the questions raised about sunset provisions. While it is important to address and adapt to changing market conditions, we do not believe sunset provisions would be appropriate or effective in achieving that. There are already significant hurdles to finalizing a rule at the SEC as evidenced by the still outstanding Dodd-Frank rulemaking provisions. Once a rule is adopted it must be final. Adding obstacles or sunset provisions would unacceptably encumber this process. [Q1, Q2, Q3]

II. Regulation S-K should be revised to ensure that investors and the public receive information that is important to them

The federal securities laws authorize the SEC to adopt disclosure rules to protect investors, promote fair and efficient markets, as well as promote the public interest. This statutory mandate is distinct from the Supreme Court’s interpretation of the antifraud provisions of the federal securities laws as requiring disclosure of information that a

¹⁰ *Know Before You Owe*, CFPB (2015) available at: <http://www.consumerfinance.gov/knowbeforeyouowe/#2>.

¹¹ *Know Before You Owe*, CFPB (2015) available at: <http://www.consumerfinance.gov/knowbeforeyouowe/#20>; see also: *Know Before You Owe: Quantitative Study of the Current and Integrated TILA-RESPA Disclosures*, CFPB (2013) available at: http://files.consumerfinance.gov/f/201311_cfpb_study_tila-respa_disclosure-comparison.pdf.

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“reasonable investor” could find would “significantly alter the total mix of information” available.¹²

Regulation S-K is an attempt by the SEC to standardize the requirements for production of a significant portion of this information. However, in the several decades since it was first adopted, investors’ demands for information have changed. Reasonable investors, more than ever before, want and need broad swaths of information that are simply inadequately addressed by the current Regulation S-K framework. We strongly encourage the SEC to revise Regulation S-K to expand and modernize issuers’ disclosure obligations for the 21st Century.

A. Investor Demand—Not Issuer Discretion—Must Determine What Disclosures Are Required

While a conception of materiality is necessary for the functioning of any system of securities disclosure, the definition of what is material under the ’33 and ’34 Act disclosure system must be driven by the reasonable needs and interest of investors and by the public interest, *not* by issuers’ interests. By definition, if investors consider something to be material, the SEC must require its disclosure by registrants.

We are deeply concerned by those who would misconstrue or seek to weaken this obligation.¹³ SEC Chair Mary Jo White seems to have offered conflicting definitions of what must be disclosed in her speech to the International Corporate Governance Network earlier this year. She first stated that, using the “materiality” lens” the Commission must “ensure that our disclosure regime evolves to continue to provide the total mix of information necessary for the ‘reasonable investor’ whose priorities and investing behavior also continue to evolve.” By the end of the speech, however, she suggested that sustainability disclosures are only required if it is “material” to “a

¹² *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), at 449. See also, *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); see also *Matrixx Initiatives, Inc., et al., v. Siracusano et al*, 131 S. Ct. 1309 (2011).

¹³ The Sustainability Accounting Standards Board (“SASB”) has done remarkable work engaging issuers to identify “material” industry- and sector-specific key performance indicators. However, SASB has misconstrued what “material” means. Further, we note that adopting SASB’s approach wholesale would allow issuers to decide for themselves year-to-year whether SASB’s enumerated key performance indicators (“KPI”) were material and thus needed to be disclosed. This would leave investors with spotty and inconsistent data and make it more difficult to track a company’s performance on those indicators over time.

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company's financial condition or results of operations."¹⁴ This narrower definition is far less than what the law plainly requires,¹⁵

In general, Regulation S-K structures a disclosure system where issuers have general obligations to disclose material information, and specific requirements to disclose information whose disclosure the Commission finds to be *per se* in the interests of investors and the public.

However, this system has not kept pace with developing investor understanding of what information is relevant to investor decisions. One area where the disclosure system has not kept up with investor demand for information that is of particular importance both from an investor and a public interest perspective is the area sometimes referred to as "environmental, social and governance" or "ESG" issues. In this area, unlike other areas of issuer disclosure, the decision as to what to disclose is left almost entirely up to issuers to determine. The lack of *per se*, line item disclosure requirements in the area of ESG has meant, in effect, that issuers have excessive discretion to determine what information is disclosed to investors.

In the ESG area, and in other disclosure categories, the Commission should make a greater effort to seek to understand what investors consider to be material. The Commission should do so by soliciting direct input from diverse investors, among other things. This should hold true with issues ranging from international tax obligations, to human capital disclosures, to corporate political spending, and beyond.

B. The SEC Should Retain the Existing Framework for Required Reporting Pursuant to Item 303 (Management Discussion and Analysis)

The Release also sought information about the different, and relatively narrow, materiality standard specifically in the context of Item 303, Management Discussion and Analysis ("MD&A"). We do not believe it is appropriate or necessary to change the

¹⁴ SEC Chairwoman Mary Jo White, "Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability" (June 27, 2016). Available at: <https://www.sec.gov/news/speech/chair-white-icgn-speech.html>.

¹⁵ For example, the total cost of fines for safety violations at Massey Energy may have seemed immaterial relative to their bottom line but more comprehensive disclosure of those violations may have alerted investors to the company's general disregard for workplace safety and the significant risk of a disaster like the mine explosion that occurred in 2010 precipitating a collapse in the company's stock price. Parker and Mider, "Alpha Natural Agrees to Buy Massey Energy for \$7.1 Billion" *Bloomberg* (January 29, 2011). Available at: <http://www.bloomberg.com/news/articles/2011-01-29/alpha-natural-agrees-to-buy-massey-energy-for-8-5-billion-in-cash-stock>.

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current two step test which provides first that disclosure is unnecessary if the relevant trend “is not reasonably likely to occur” and then, second, to the extent that management cannot make that determination, disclosure is required “unless management determines that a material effect on the registrant’s financial condition or results of operations is not reasonably likely to occur”.

We concur once again with the Investor Advisory Committee in saying that the Commission should not apply the “probability/magnitude” test used by the Supreme Court in *Basic v. Levinson* to Item 303 as such a change would raise the threshold and thus inappropriately reduce the information available to investors in the MD&A section of corporate reporting.¹⁶ [Q99-102] [Q103, Q104, Q105, Q106]

C. The SEC Should Continue with a Mix of Principles and Rules-Based Obligations.

The Concept Release seeks input about whether reporting obligations should be revised to be more principles or rules-based. Regulation S-K is currently a mix of principles and rules-based obligations. We strongly disagree with commenters who advocate for an exclusively principles-based approach.

“Materiality,” the dominant principle in our disclosure regime, defines the floor below which reporting becomes fraudulent. It is the catchall, a backstop, the “at a minimum” safety provision. It is *not* the driving force of our disclosure regime. The ’33 and ’34 Acts charge the Commission with establishing a disclosure regime to protect investors and our markets. It cannot achieve this by focusing merely on what would constitute fraud.

Instead, the Commission should incorporate the needs of investors and the public in establishing a disclosure framework that requires issuers to provide the information that investors deem important to effectively analyze both the company’s current and future performance prospects as well as its impact on broader risk and return considerations within the markets.

Line-item disclosures are irreplaceable tools that allow investors to sort through complex information and measure a company’s performance over time and against its peers. Without it, we would be left with a patchwork of incomparable and inconsistent data that would need to be analyzed on a case-by-case basis, far exceeding the

¹⁶ See *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); IAC letter p 8, Available at: <https://www.sec.gov/comments/s7-06-16/s70616-22.pdf>

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resources and capacity of even the most sophisticated investors. Line-item disclosures are necessary to make information provided useable.

Standardized mandatory line-item disclosures also improve competition in the markets by leveling the playing field. Currently high-road companies that provide robust voluntary disclosures may find themselves at a competitive disadvantage to their peers who elect to disclose nothing. For example, consider voluntary reporting on the impacts of climate change. In many cases, the more comprehensive the disclosure, the larger the company's footprint might appear. In this way, the system of voluntary reporting may have the perverse effect of disincentivizing good reporting and disadvantaging rather than rewarding the high-road companies that voluntarily disclose anyway. [Q11, Q37]

Finally, in determining when line-item requirements must be disclosed, thresholds may be useful as a rule of thumb but they should not be available as an absolute exemption or excuse for nondisclosure. As the Staff Accounting Bulletin No. 99 on materiality pointed out nearly 17 years ago, "exclusive reliance on [] any percentage or numerical threshold has no basis in the accounting literature or the law."¹⁷ This must continue to be the case when determining materiality or disclosure requirements. [Q11]

Given the diverse nature of investor and public needs, we urge the Commission to continue to utilize principles-based disclosure obligations where flexibility and adaptability may be more appropriate, and line-item disclosures where consistency and comparability may be more readily necessary. Rather than a one-size-fits-all approach, this combination is far more likely to provide investors and the public with the types of information they seek, in a manner that is most useful to them.

D. The Commission is obligated to promote the public interest.

Beyond and besides whatever is determined to be material, the Commission has the authority and an obligation to require disclosures to protect investors and promote the fair, orderly and efficient operations of our markets. To fulfill those missions, the Commission must go beyond materiality considerations and demand broader disclosures that may be necessary to promote the public interest.

The Securities Act of 1933 (the "33 Act"), first directs the Commission to "consider or determine whether an action is necessary or appropriate in the public

¹⁷ SEC Staff Accounting Bulletin No. 99 – Materiality (August 12, 1999). Available at: <https://www.sec.gov/interps/account/sab99.htm>

interest,” and then, “in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.”¹⁸

Likewise the Securities Exchange Act of 1934 (the “34 Act”), which compels issuers to make regular reports, provides that “transactions in securities... are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto... in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions”.¹⁹

The Release itself recognizes that both Acts authorize the Commission to regulate registrant disclosure “as necessary or appropriate in the public interest or for the protection of investors.”²⁰ That language appears throughout several statutes that each endow the Commission with the authority to act.²¹

Consideration of the public interest is thus a statutory obligation that is often overlooked. This review process provides an opportunity to consider how disclosure affects the public interest and how the Commission can better fulfill that part of its mission.

This issue has taken on increased salience as a result of the Supreme Court’s decision in *Citizens United*, in which the Court’s majority pointed to the Commission’s ability to require public corporations to disclose political spending as a way of protecting the public interest in honest and open elections.

III. There are specific areas where current reporting requirements are insufficient and the SEC should consider issuing new line-item disclosure requirements.

The issues discussed below are of significant importance to the protection of investors, yet are subject to no or inadequate disclosure requirements. The public discourse has also become increasingly concerned with “quarterly capitalism” and the

¹⁸ The Securities Act of 1933, §2(b) Consideration of Promotion of Efficiency, Competition, and Capital Formation. 15 U.S.C. §77b(b). Available at: <https://www.sec.gov/about/laws/sa33.pdf>.

¹⁹ The Exchange Act of 1934, §2 Necessity for Regulation as Provided in this Title. 15 U.S.C. §78b. Available at: <https://www.sec.gov/about/laws/sea34.pdf>.

²⁰ “Business and Financial Disclosure Required by Regulation S-K,” File No. S7-06-I 6, 81 Fed. Reg. 78, at 23921 (4/22/2016). Available at: <https://www.sec.gov/rules/concept/2016/33-10064.pdf>

²¹ “Business and Financial Disclosure Required by Regulation S-K,” File No. S7-06-I 6, 81 Fed. Reg. 78, at 23921 (4/22/2016). Available at: <https://www.sec.gov/rules/concept/2016/33-10064.pdf>.

great costs it extracts from our society and our markets.²² True long-term investors like pension funds and retirement savers, with investing horizons that extend beyond twelve months, need greater, better and more consistent information in order to effectively manage their investments whether as principals or on behalf of their clients and beneficiaries.

First, additional disclosure is needed on financial strategies that involve stock buybacks, exposure to swaps and derivatives, aggressive tax planning and executive compensation practices, all of which can promote financial engineering over investment in the growth of the company. Second, in view of the growing body of evidence that human capital management strategies can have significant impacts on the economy, the public interest and company performance, we believe new line-items disclosure requirements related to these risks and opportunities are necessary.²³ Third, given the clear and growing demand from investors for environmental, social and governance (“ESG”) information, the Commission must begin requiring ESG related line-item disclosures as well as a process to incorporate emerging ESG metrics into disclosure in the future. Finally, investor and public demand for corporate political spending disclosure is unprecedented, the Commission should begin the process of this rulemaking immediately.

Better disclosure of the aforementioned issues, among others, can enable investors to distinguish between investments built on growth and value creation that will perform over the long-term and companies that rely on short-term strategies, financial engineering, externalizing costs and market manipulation. This would provide immeasurable benefits to our financial system and empower investors to play their appropriate role in the markets.

A. Tax strategies and Foreign Subsidiaries

²² Neil King Jr, “Hillary Clinton Is Not the Only Critic of ‘Quarterly Capitalism’” *Wall Street Journal* (July 31, 2015), available at: <http://blogs.wsj.com/washwire/2015/07/31/hillary-clinton-joins-al-gore-prince-charles-and-etsy-in-criticizing-quarterly-capitalism/>.

²³ Bernstein and Beeferman, “The Materiality of Human Capital to Corporate Financial aPerformance,” Investor Responsibility Research Center Institute (IRRCi) and Labor and Worklife Program at Harvard Law School (April 2015). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605640. See also Zeynep Ton, “The Effect of Labor on Profitability: The Role of Quality” Harvard Business School Technology & Operations Mgt. Unit Research Paper No. 09-040 (July 27, 2009). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269523.

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The '34 Act specifically calls on the SEC to “[protect] the Federal taxing power,”²⁴ yet aggressive tax strategies are responsible for diverting hundreds of billions of dollars in tax revenues from the American public.²⁵ Additionally, these tax strategies and the use of foreign subsidiaries may be among the biggest and most immediate risks to investors and threats to the public interest today. Companies that rely on tax strategies to drive revenue rather than product development or expansion may face great challenges to their long-term growth and risks to their near term profitability. In spite of this, disclosure in this area is wholly inadequate to distinguish which companies are using what strategies. Additional disclosure must be required.

The scope of this problem cannot be overstated. The amount of U.S. corporate profits held offshore increased from \$434 billion in 2005 to \$2.4 trillion in 2015.²⁶ Although the corporate income tax rate in the U.S. is 35%, by shopping for favorable jurisdictions some companies pay as little as 9.8%; an individual company can avoid up to \$2.4 billion in U.S. taxes in a single year.²⁷ Additionally, many companies have pushed for tax breaks when repatriating profits on the grounds that they will create jobs back in the U.S., although those job creation numbers also cannot be verified, even by regulators.²⁸

First, we as investors face real, hidden risks related to tax practices; aggressive tax strategies can allow a company to appear profitable while, in reality, its underlying business is unsound. In addition to the questions these strategies raise about long-term viability, companies with aggressive and questionable tax practices likely face near-term threats to their profitability. Potential liability related to changes in tax rules could be massive and could happen very quickly given the intense focus of both U.S. and foreign regulators on this issue.²⁹ A Credit Suisse report found that for many major companies,

²⁴ The Exchange Act of 1934, §2 Necessity for Regulation as Provided in this Title. 15 U.S.C. §78b. Available at: <https://www.sec.gov/about/laws/sea34.pdf>.

²⁵ Americans for Tax Fairness, “Chart Book: Offshore Corporate Taxes, Profits & the Competitiveness of the U.S. Tax System” (May 2016) p.3. Available at: <http://www.americansfortaxfairness.org/files/ATF-Chartbook-Offshore-Corporate-Taxes-Corporate-Profits-Competitiveness-of-U.S.-Tax-System-May-2016-5-5-16-1.pdf>.

²⁶ Americans for Tax Fairness, “Chart Book: Offshore Corporate Taxes, Profits & the Competitiveness of the U.S. Tax System” (May 2016) p.3. Available at: <http://www.americansfortaxfairness.org/files/ATF-Chartbook-Offshore-Corporate-Taxes-Corporate-Profits-Competitiveness-of-U.S.-Tax-System-May-2016-5-5-16-1.pdf>.

²⁷ Duhigg and Kocieniewski, “How Apple Sidesteps Billions in Taxes” New York Times (April 28, 2012) available at: http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html?_r=0.

²⁸ Michelle Leder, “The \$104 Billion Refund: The most absurd corporate tax giveaway of 2005” Slate, (April 13, 2006). Available at: http://www.slate.com/articles/business/moneybox/2006/04/the_104_billion_refund.html.

²⁹ See, for example, Heath Aston, “Chevron hits out at ‘tax dodger’ claims at fiery Senate inquiry” The Sydney Morning Herald, (November 18, 2015). Available at: <http://bit.ly/29LoKYL>.

their potential offshore tax liability represents over 10% of the company's total market cap.³⁰

There are efforts currently underway in the U.S. to regulate and rein in these practices. International bodies like the OECD and the G20 are actively working on international frameworks to deal with tax dodging.³¹ The European Union is already requiring member countries to begin disclosing cross-border tax deals with multinationals, and is considering proposals to require country-by-country reporting of existing and potential tax liability and risks among the 28 member nations and designated tax havens.³²

Foreign governments are already cracking down. Chevron was hit with a \$269 million tax assessment that was upheld in Australian court.³³ The French government is seeking approximately \$1.8 billion in taxes from Google's French operations.³⁴ Existing tax disclosures reveal none of this and in some cases may actually be used to obscure a company's tax arrangements and potential liabilities.

The SEC's mandates compel it to require tax planning and foreign subsidiary related disclosures. Specifically, we believe these must include, though should not be limited to: [Q52, Q53]

- a list of each country of operation and the name of each entity of the issuer group domiciled in each country of operation;
- the number of employees physically working in each country of operation;
- the total pre-tax gross revenues of each member of the issuer group in each country of operation;

³⁰ Zion, Gomatam and Graziano "Parking A-Lot Overseas" Credit Suisse, (March 17, 2015). Available at: <http://bit.ly/1dzsUSj>.

³¹ OECD Press Release "G20 leaders endorse OECD measures to crack down on tax evasion, reaffirm its role in ensuring strong, sustainable and inclusive growth" (November, 16, 2015). Available at: <http://www.oecd.org/g20/meetings/antalya/g20-leaders-endorse-oecd-measures-to-crackdown-on-tax-evasion-reaffirm-its-role-in-ensuring-strong-sustainable-and-inclusive-growth.htm>.

³² European Commission Press Release "Introducing public country-by-country reporting for multinational enterprises – Questions and Answers" (April 12, 2016). Available at: [http://europa.eu/rapid/press-release MEMO-16-1351_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1351_en.htm).

³³ Heath Aston "Chevron hits out at 'tax dodger' claims at fiery Senate inquiry" The Sydney Morning Herald, (November 18, 2015). Available at: <http://bit.ly/29LoKYL>.

³⁴ Chris Arnold, "Google's Paris Offices Raided in Tax Investigation" NPR, (May 24, 2016). Available at: <http://n.pr/1sOgoGZ>

- the total amount of payments made to governments by each member of the issuer group in each country of operation, without exception, including, and set forth according to—
 - total Federal, regional, local, and other tax assessed against each member of the issuer group with respect to each country of operation during the covered period; and
 - after any tax deductions, tax credits, tax forgiveness, or other tax benefits or waivers, the total amount of tax paid from the treasury of each member of the issuer group to the government of each country of operation during the covered period; and
- all corporate subsidiaries, providing the name, location, LEI number, and relation to the parent entity. [Q153, Q200, Q209]

This information reflects some of the best thinking by advocates and experts³⁵ and is critical for investors to understand how companies are structured and operate and to assess a company's actual potential tax liability, including any operations in jurisdictions with a high likelihood of reforming its tax code in the near future. It also has tremendous implications for the public interest and efficiency and competition in our markets. We concur with both the IAC, the FACT Coalition and Americans for Tax Fairness in calling on the SEC to take immediate action to require disclosure on tax related issues, and specifically the disclosures laid out above.

B. Stock Buybacks

Stock buybacks are another area in need of expanded disclosure. We see them as a symptom of the short-termism discussed throughout this comment and a serious source of risk to our investments. Instead of investing in research, new technologies or a skilled workforce for long-term growth, companies are spending hundreds of billions of dollars each year to prop up their stock prices artificially.³⁶ [Q199-204]

In 2015, the S&P 500 spent a combined \$955 billion on stock repurchases and dividends compared to \$763 billion in earnings, meaning these companies returned

³⁵ The Financial Accountability and Corporate Transparency (FACT) Coalition letter to the SEC, "Re: File No. S7-06-16, Business and Financial Disclosure Required by Regulation S-K" (July 6, 2016). Available at: <https://www.sec.gov/comments/s7-06-16/s70616-28.pdf>.

³⁶ David Trainer, "How Stock Buybacks Destroy Shareholder Value" Forbes, (February 24, 2016). Available at: <http://www.forbes.com/sites/greatspeculations/2016/02/24/how-stock-buybacks-destroy-shareholder-value/#2c2de0b0800d>.

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more capital to their shareholders than they earned, leaving no retained earnings for investment.³⁷ This raises serious questions about long-term shareholder value creation.

Laurence Fink, chairman and CEO of Blackrock Inc., the largest asset manager in the world, shares this concern. In an April 14, 2015 letter to the CEOs of the S&P 500 companies he said large stock buybacks “sends a discouraging message about a company’s ability to use its resources wisely and develop a coherent plan to create value over the long-term.”³⁸

Although Item 703 of Regulation S-K currently requires disclosure of stock repurchases, that information is so minimal that it does not explain how repurchases fit into a company’s strategic capital allocation decisions.³⁹ The relationship between stock buybacks and executive compensation performance metrics such as earnings per share and return on equity is also key information for investors, as these performance metrics may motivate companies to undertake repurchases instead of investing for the long-term.⁴⁰ More than half of the S&P 500 companies use earnings per share as a performance metric for incentive-based executive compensation.⁴¹

For these reasons, we urge the Commission to require expanded disclosure in the following areas:

- the source of funding for the repurchases, including the impact on a company’s cash holdings, debt and credit ratings;
- the time frame over which the company expects to buy back its stock and an explanation of the objective of the stock repurchases;

³⁷ S&P Dow Jones Indices press release dated June 22, 2016: S&P 500 Q1 Buybacks Jump 12%, Available at: <http://us.spindices.com/documents/index-news-and-announcements/20160622-buyback.pdf>; See also, Wilson, David “S&P 500 Spending on Buybacks, Dividends Exceeds Operating Profit” *Bloomberg* (June 26, 2015). Available at: <http://www.bloomberg.com/news/articles/2015-06-26/s-p-500-spending-on-buybacks-dividends-exceeds-operating-profit>

³⁸ “Blackrock CEO Larry Fink tells the world’s business leaders to stop worrying about short-term results,” *Business Insider*, from the BlackRock Blog (April 14, 2015). Available at: <http://www.businessinsider.com/larry-fink-letter-to-ceos-2015-4>.

³⁹ Letter from William J. Klein and Thomas J. Amy to the Division of Corporation Finance (May 12, 2015). Available at: <https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-42.pdf>.

⁴⁰ Alex Barinka, “This Chart Shows How CEOs Get Rich by Dumping on You,” *Bloomberg News*, (July 7, 2015). Available at: <http://www.bloomberg.com/news/articles/2015-07-07/ceos-get-pay-boost-too-when-they-give-back-cash-to-shareholders>.

⁴¹ Brettell, Gaffen and Rohde, “Stock Buybacks Enrich the Bosses Even When Business Sags,” *Reuters*, (December 10, 2015). Available at: <http://www.reuters.com/investigates/special-report/usa-buybacks-pay/>.

- an analysis of their expenditures on stock repurchases compared to their spending on research and development and capital expenditures in the management discussion and analysis section of their annual 10-k filings;
- an explanation of the rationale for the stock buybacks when the cost of the repurchases exceeds their net income or cash generated from operating activities during that period; and
- executive compensation performance metrics and their weightings and if those metrics are affected by repurchases.⁴²

C. Derivatives and swaps exposures

Derivatives and swaps are yet another source of risk we face as investors and an area in need of expanded disclosure. Many practitioners consider derivative and swaps to be tools to reduce risk; however, in practice these tools more often create and obscure risk. There are too many examples in recent history of apparently stable companies facing massive financial problems over exposure to derivatives. [Q157-Q163]

For example, in 1994, Procter & Gamble, a consumer product company, suffered a \$157 million loss upon liquidating two swap contracts, in total a \$102 million loss after taxes on its quarterly profits.⁴³ That same year swaps caused major losses for Gibson Greetings, Inc. and were a critical factor in the outright bankruptcy for Orange County resulting in the largest municipal bankruptcy filing in American history to that point.⁴⁴

In spite of these failures and the multiple governmental investigations that ensued⁴⁵ swaps continued to play a major role in companies' portfolios until they again wreaked havoc in the collapse of AIG and Lehman Brothers. Enhanced disclosure would not only provide useful information to investors and parties to swaps but would also ensure that issuers, on a regular basis, were analyzing their exposures.

One potential disclosure item would be credit triggers, i.e. when banks require companies to fully collateralize credit exposures under certain conditions. These

⁴² In a November 2015 letter to the SEC, Sen. Tammy Baldwin, D-Wisconsin urged the SEC to require this disclosure. Sen. Tammy Baldwin letter to SEC Chair Mary Jo White, (November 16, 2015). Available at: <https://www.baldwin.senate.gov/imo/media/doc/111615%20Letter%20to%20SEC.pdf>.

⁴³ Lawrence Malkin, "Procter & Gamble's Tale of Derivatives Woe," NY Times (April 14, 1994). Available at: <http://www.nytimes.com/1994/04/14/business/worldbusiness/14iht-procter.html>.

⁴⁴ "Two Early Derivatives Blow Up," PBS Frontline (October 20, 2009). Available at: <http://www.pbs.org/wgbh/pages/frontline/warning/etc/warnings.html>.

⁴⁵ Holland, Himelstein and Schiller, "The Bankers Trust Tapes," Businessweek (October 16, 1995). Available at: <http://www.businessweek.com/1995/42/b34461.htm>

triggers can result in extraordinary cash demands in an instant, creating large liquidity risk. Moreover, because banks enjoy bankruptcy priority on collateral in support of swaps, they are incentivized to exercise rights under credit triggers even if doing so puts the counterparty out of business. Credit triggers have famously resulted in massive, swap-induced bankruptcies, from AIG, to Jefferson County, Alabama, to Enron.⁴⁶

Such risks are highly significant and we as investors, along with companies and regulators, need to understand them. That understanding is virtually impossible when disclosure surrounding a company's derivatives contracts is lacking and when there is limited standardization. Comprehensive disclosure would improve the understanding and pricing of derivatives-related risks by all stakeholders.

D. Sustainability & Public Policy [Q216-223]

Sustainability and public policy are additional areas where there exists significant and growing investor demand for disclosure. This is evidenced by the vast number of signatories to the UN Principles for Responsible Investment as well as the growing adoption of sustainability reporting frameworks like the Global Reporting Initiative.⁴⁷

Environmental, social and governance ("ESG") issues increasingly appear to be useful and important indicators of performance. ESG issues often have material impacts based on quantitative measures like expenditures required or effects on earnings as well as qualitative measures like reputational impacts or impacts on the issuer's consumers' purchasing decisions.⁴⁸

In spite of ESG metrics and issues being a serious source and predictor of risk and returns, there are no standardized required disclosures. That information is essential for both the public interest and the protection of investors. We concur with the recommendation of the Investor Advisory Committee that the Commission should establish an analytical framework to provide guidance to companies trying to conduct this analysis on material ESG issues in their operations.⁴⁹ In the interim, the Commission must at least treat ESG sources of risk and return with the same standard of materiality it applies to other sources of risk and return. We note, however, that given

⁴⁶ Wallace C. Turbeville, "Derivatives Innovation in the Era of Financial Deregulation," Demos, p 16. Available at: <http://www.demos.org/sites/default/files/publications/Innovation%20in%20the%20Era%20of%20Financial%20De%20regulation-%20Derivatives%20report.pdf>.

⁴⁷ The UN PRI includes 1,500 signatories who collectively manage assets of more than U.S.\$60 trillion. These signatories commit to, inter alia, incorporate environmental, social and governance factors into their investment decision-making, <https://unpri.org/about>

⁴⁸ The Commission has noted this possibility in vague terms. See Exchange Act Release No. 61469 (Feb. 12, 2010).

⁴⁹ IAC letter, p 8. Available at: <https://www.sec.gov/comments/s7-06-16/s70616-22.pdf>.

the limited impact of the Staff's 2010 guidance on climate change, this approach will be insufficient over the long-term.

Additionally, we believe the Commission needs dedicated staff trained and tasked to work on these issues. That staff could be instrumental in identifying emerging risks and trends, whether general or specific to an industry. Further, as certain indicators become more established and more widely accepted as material, the Commission would be in a position to move those indicators from "guidance" to specific, mandatory line-item disclosures.

Finally, it is clear that enforcement is crucial. The Commission must review disclosures and take action when reporting is deficient. The negligible impact of the Commission's 2010 Staff Bulletin on the disclosure of climate-related risk demonstrates this without question. In spite of clear guidance from the Commission outlining how climate change may be material to any kind of company, little has changed in the reporting on the issue.⁵⁰

Establishing such processes would help the Commission keep up with evolving market conditions and trends. It would keep the Commission at the forefront of emerging ESG issues rather than trying to catch up once a material risk or trend has already manifested in the market place. Most importantly, this process would help ensure effective disclosure of ESG issues, which in turn can help investors make better investing and proxy voting decisions. [Q220]

E. Political Spending and Lobbying

A diversity of investors has been calling for political spending disclosure for years with substantial and growing evidence of its importance. A rulemaking petition submitted in 2011 by a committee of prominent law professors garnered unprecedented levels of public and investor support, with over 1.2 million comments submitted to date almost entirely supportive of increased disclosure.⁵¹ Those comments came from a range of stakeholders far broader than retail investors; it includes institutional investors, State Treasurers, Members of Congress, Former SEC Chairs and Commissioners, major endowed foundations, public pension funds, and more.⁵²

⁵⁰ Gelles, David, "S.E.C. Is Criticized for Lax Enforcement of Climate Risk Disclosure" *NYTimes* (January 23, 2016). Available at: http://www.nytimes.com/2016/01/24/business/energy-environment/sec-is-criticized-for-lax-enforcement-of-climate-risk-disclosure.html?_r=0.

⁵¹ *Comments on Rulemaking Petition: Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities*, available at: <https://www.sec.gov/comments/4-637/4-637.shtml>.

⁵² Comments to the record assessed on 5/3/16. <https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml>.

There is a growing body of research that demonstrates the importance of corporate political spending for investors. One study of over 1,000 S&P firms concluded, “that firms’ political spending, in particular contributions to policy makers, at best has an insubstantial impact on their bottom line and more often results in a negative effect on financial performance.”⁵³ Another paper found that “in most industries, political activity correlates negatively with measures of shareholder power, positively with signs of agency costs, and negatively with shareholder value.”⁵⁴

Furthermore, the landmark Supreme Court Case *Citizens United vs Federal Election Commission* 558 U.S. 310 (2010), which permitted the flow of unlimited corporate dollars into U.S. elections specifically envisioned a system in which disclosure of political spending protected shareholder interests. “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁵⁵

Yet disclosure of these issues is still voluntary and leaves us as investors with only a patchwork of information. It is incumbent upon the Commission to take action and require disclosure of corporate political spending. Such disclosure should include, though not be limited to:

- Direct contributions to state-level political candidates, political parties, judicial races, ballot initiatives;
- Contributions to a range of tax-exempt entities such as trade associations and 527 organizations that engage in political activity; and
- Spending on political advertising on public policy issues or to advocate for or against the election of particular candidates.

The disclosure requirements should also be structured to evolve and keep pace with emerging practices around political spending. Countless new vehicles and mechanisms have emerged in recent years to facilitate corporate influence over the governance of public institutions. The rules must ensure that transparency is required even as novel schemes emerge.

⁵³ Professor Michael Hadani, SEC comment to file 4-637 submitted 10/13/2011, <https://www.sec.gov/comments/4-637/4637-8.pdf>.

⁵⁴ John C Coates, “Corporate Politics, Governance, and Value Before and After Citizens United,” Harvard Law School, Journal of Empirical Legal Studies (July 6, 2012). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128608.

⁵⁵ *Citizens United vs Federal Election Commission*, 558 U.S. 310 (2010) at 55.

Investors need this information in order to “hold directors and executives accountable when they spend corporate funds on politics in a way that departs from shareholder interests.”⁵⁶ Investors also need consistent and comparable disclosures to distinguish between potential investments and monitor ongoing risks. Mandatory disclosure is also important for best-in-class issuers in that it would level the playing field and address any concern that disclosing political spending activities might put the high-road reporter at a competitive disadvantage to its peers.

Although the Commission can’t finalize this rule until the next budget cycle, it must begin the preliminary work now.

IV. Human Capital Management is an area of great importance to evaluating companies and potential investments but is subject to virtually no disclosure requirements.

Human capital management (“HCM”) is yet another area where we are increasingly finding a significant impact on corporate performance.⁵⁷ HCM refers to a set of practices and strategies for how a company recruits, manages and develops its human capital (i.e. workforce). Executives are always quick to say that their workforce is their greatest asset yet rarely offer information on how that asset is maintained, cultivated or grown. Likewise, many companies describe the cost of labor as one of their biggest expenses, yet still offer precious little information on what that cost is comprised of or how it is managed.

Presently, companies must only disclose a single metric regarding their human capital: the number of workers, which is often accompanied by generic statements about the need to attract and retain the best employees. Furthermore, any investment in human capital is buried in the Selling, General and Administrative Expenses (“SG&A”) disclosure, undistinguishable from money spent on office supplies or corporate lunches.

That is to say, any investment in human capital is essentially viewed as overhead and not an investment in the firm.

In today’s companies, intangible assets like human capital are more important to performance than ever. Over the last century physical assets played a far greater role in creating value and driving performance and thus received substantial attention in

⁵⁶ File No. 4-637, *Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities* (August 3, 2011) <https://www.sec.gov/rules/petitions/2011/petn4-637.pdf>.

⁵⁷ “\$2.6 Trillion Investor Coalition Sees Link Between Human Capital Management and Shareholder Return” Engagement Strategies Media. Available at: <http://www.enterpriseengagement.org/articles/content/8472962/26-trillion-investor-coalition-sees-link-between-human-capital-management-and-shareholder-return/>.

financial reporting. Today, however, intangible assets drive a much greater share of value creation and accordingly require far greater attention in mandatory corporate disclosures.

For all of these reasons, we urge the Commission to require disclosure of HCM related metrics, to consider the various metrics and frameworks being developed by stakeholders and practitioners, and specifically to require metrics including but not limited to:

- Investment in workforce training and education;
- Annual employee turnover, voluntary and involuntary;
- Total amount spent on third-party human resources, both third-party contracts and independent contractor expenditures;
- Labor standards in the supply chain;
- Health and safety violations;
- Gender pay disparities;
- Percentage of employees that are represented by a union;
- Benefits and incentive structures available to employees;
- Strategies and goals related to HCM; and
- Legal or regulatory proceedings related to employee management.

This information would enable investors to make informed investment decisions based on the trends in a company's workforce, and to better assess the competitiveness and productivity of companies. Currently, company disclosures vary greatly, making it virtually impossible to compare employment trends between companies in the same industry.

A. Number of Employees

The Commission could address some of the issues raised in this section by expanding on the existing requirement to disclose the number of employees. Specifically, we believe the SEC should require companies to disclose the breakdown of their workforce between foreign and domestic workers (including any countries where it employs a significant percentage of their foreign workers) as well as between full time, part time, contract and seasonal workers, and an explanation of the changes from year to year distinguishing between changes due to attrition, layoffs or outsourcing. [Q54, Q55, Q57, Q58]

The issue of job creation is also significant to us as investors.⁵⁸ The U.S. Commerce Department's Bureau of Economic Analysis's data shows that overall, large U.S. corporations shed 655,900 domestic jobs between 1999 and 2013, while creating 4,453,00 overseas.⁵⁹ In addition to the systemic risks this creates for the U.S. economy and labor market, many companies receive special tax treatment in exchange for a promise to create U.S. jobs.⁶⁰ Thus a company's success in creating jobs in the U.S. may also directly impact that company's tax status and rate. [Q59]

Current reporting is inconsistent and offers little useful comparable information to investors. For example, Microsoft breaks down the total number of employees between domestic and international employees as well as by function.⁶¹ Google and Apple, on the other hand, list only their total worldwide employees.⁶² Although Apple used to disclose the breakdown between full-time and contractors, it has elected to stop providing that important information.⁶³

Each of these pieces of information would allow us as investors to better assess the scale and viability of a company's operations, track the impact of outsourcing as well as trends in the workforce and the relative competitiveness and productivity of companies. Further, it would allow us to see the impact of subcontracting on a company's operations and identify which companies are creating jobs in the U.S.

B. Diversity and Gender Pay Equity

Diversity and gender pay equity are additional areas where a lack of disclosure has been met with increasing public interest, growing investor demand and research demonstrating the information's importance to corporate performance. For these

⁵⁸ Jia Lynn Yang, "Proposed jobs bill would target foreign outsourcing by U.S. companies" The Washington Post, (February 1, 2012). Available at: https://www.washingtonpost.com/business/economy/proposed-jobs-bill-would-target-foreign-outsourcing-by-us-companies/2012/01/31/gIQAPLHOHQ_story.html.

⁵⁹ Employment of U.S. Multinational Enterprises, U.S. Parents and Foreign Affiliates of the Department of Chamber's Bureau of Economic Analysis, (August 2015) p 3. Available at: http://www.bea.gov/scb/pdf/2015/08%20August/0815_activities_of_multinational_enterprises.pdf

⁶⁰ Michelle Leder, "The \$104 Billion Refund: The most absurd corporate tax giveaway of 2005" Slate (April 13, 2006). Available at: http://www.slate.com/articles/business/moneybox/2006/04/the_104_billion_refund.html

⁶¹ Microsoft 2015 Annual Report. Available at: <https://www.microsoft.com/investor/reports/ar15/index.html#investor-relations>.

⁶² Google 2015 annual report, page 23. Available at: <https://www.sec.gov/Archives/edgar/data/1288776/000165204416000012/goog10-k2015.htm>. See also Apple 2015 10-k. Available at: <http://investor.apple.com/secfiling.cfm?filingid=1193125-15-356351&cik=320193>.

⁶³ Apple 2012 10-k. Available at: <https://www.sec.gov/Archives/edgar/data/320193/000119312512444068/d411355d10k.htm>.

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reasons, we believe this is another subject matter where the Commission should consider required line-item disclosures.

First, public awareness of the problem with a lack of diversity and unequal treatment of women and minorities in corporate boardrooms, management and leadership has grown along with calls for action. Currently women represent less than 20% of directors on the boards of the S&P500 companies.⁶⁴ Even Chairwoman Mary Jo White identified broadening diversity on company boards as an important priority.⁶⁵ In 2015, women continue to make only 79% of what their male counterparts are made.⁶⁶ In spite of public attention to the issue, companies have still done little to correct the wage gap.

Second, investor demand has been building over recent years. Current reporting is seriously lacking and investors are left to rely on spotty and dissimilar information. In response, many coalitions and actions have emerged. The Thirty Percent Coalition was formed to pursue the goal of women, including women of color, holding 30% of the board seats across public companies.⁶⁷ The Coalition's members include institutional investors, corporate leaders and public sector allies.⁶⁸ Another group of large public pension funds submitted a rulemaking petition seeking uniform disclosures directly from issuers. The petition sought a "chart/matrix" in the proxy statement to show the skills, experiences and attributes required for all directors, plus the qualifications one or more directors must possess to facilitate identification of diverse nominees.⁶⁹ Another group of investors petitioned the SEC earlier this year to require companies to disclose the gender pay gap.⁷⁰ The Diverse Governance Initiative is yet another example with

⁶⁴ Rachel Feintzeig, "Another Study Shows Little Progress Getting Women on Boards," Wall Street Journal, (June 14, 2016). Available at: <http://www.wsj.com/articles/another-study-shows-little-progress-getting-women-on-boards-1465876862>.

⁶⁵ U.S. Securities and Commission Chair Mary Jo White speech, "Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability," U.S. Securities and Exchange Commission (June 27, 2016). Available at <https://www.sec.gov/news/speech/chair-white-icgn-speech.html>.

⁶⁶ AAUW, "The Simple Truth about the Gender Pay Gap" (Spring 2016). Available at: http://www.aauw.org/files/2016/02/SimpleTruth_Spring2016.pdf.

⁶⁷ Thirty Percent Coalition, Homepage, <http://www.30percentcoalition.org/>

⁶⁸ Thirty Percent Coalition, "Who We Are" <http://www.30percentcoalition.org/who-we-are>

⁶⁹ "Petition for Amendment of Proxy Rule Regarding <http://www.30percentcoalition.org/who-we-are#faqnoanchorBoard> Nominee Disclosure: Chart/Matrix Approach," File No. (March 31, 2015). Available at <https://www.sec.gov/rules/petitions/2015/petn4-682.pdf>.

⁷⁰ PAX Ellevest petition to the SEC, (February 1, 2016). Available at: <https://www.sec.gov/rules/petitions/2016/petn4-696.pdf>.

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growing support aimed at uniform disclosures around diversity in the boardroom and the workplace.⁷¹

Finally, there is a well-established and growing body of evidence that diversity can positively impact corporate performance. A diversity of perspectives and skill sets on a corporate board can strengthen a companies' financial performance and improve the quality of board decision making.⁷² Other studies have shown that companies that empower and advance women are likely to reap the benefits in terms of improved performance and profitability.⁷³ A Credit Suisse report mapped out management at over 3,000 companies, the "Credit Suisse Gender 3000," and demonstrated that companies with higher female representation at the board level or in top management exhibit higher returns on equity and higher valuations.⁷⁴ Conversely, poor performers on the diversity front may face greater risks of law suits, employee turnover, and reputational risk.

Given the clear investor and public interest at stake, we urge the SEC to consider requiring disclosure of the following items:

- Women and minorities on the board or in management;
- Policies or programs on sexual harassment and respecting diversity;
- EEO-1 data;
- Company policy on board diversity;
- Diversity policies and how they are enforced;
- Gender pay gap;
- How search firms are instructed on diversity; and
- Strategies or plans to address diversity issues.

This information would enable us to track progress on expanding diversity and measure companies against their stated goals. It would also allow us to do peer-to-peer

⁷¹ See UAW Trust Letter to SEC re: Business and Financial Disclosure Required by Regulation S-K (July 15, 2016). Available at: <https://www.sec.gov/comments/s7-06-16/s70616-130.pdf>.

⁷² Carter and Wagner, "The Bottom Line: Corporate Performance and women's Representation on Boards (2004-2008)," New York, Catalyst, (2011). Available at: <http://perma.cc/BEE2-ZJMU>. See also Rhode and Pakel, "Diversity on Corporate Boards: How Much Difference Does Difference Make?" Delaware Journal of Corporate Law 39 (2014): 377, 394.

⁷³ Catalyst, The Bottom Line: Corporate Performance And Women's Representation On Boards (2004-2008), accessed July 12, 2016. Available at: <http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards-20042008>.

⁷⁴ Credit Suisse Research Institute, "The CS Gender 3000: Women in Senior Management" (2014). Available at <https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=8128F3C0-99BC-22E6-838E2A5B1E4366DF>.

comparisons to see if there are any high-performers in this space or any companies that fall far outside/behind the norm.

V. Format and Technology

The format of corporate reports and the tools available for accessing them are ripe for progress. We support the continued improvement of tagging and coding of all financial reporting. Effective treatment of data on the back end should enable investors to search, sort and compare data within and between companies, industries and sectors over time. Good data management will also support the Commission's ability to aggregate and analyze data. This builds on the recommendations of the 2007 Advisory Committee on Improvements to Financial Reporting.⁷⁵

As a preliminary matter, it is essential to establish first, that any investor still receiving and relying on paper delivery of corporate disclosures receives all the relevant information whether cross-referenced, incorporated, or otherwise; and second, that all information that is incorporated or referenced is treated as filed with the SEC for legal and liability purposes. With those caveats in place, we believe that there is much to be gained by deploying technology throughout the disclosure system.

Cross-referencing can be a useful tool for organizing disclosures and reducing duplicative information. Any cross-referencing used should be precise, hyperlinked in any electronic version, and use consistently so that the location of information, as much as possible, does not change between issuers or reports. Cross-referencing should also be used where disclosure is not required or duplicative but provides relevant information to a different section of reporting. Use of cross-referencing, however, should never obscure information or detract from readability. And precautions must be taken to ensure that any investor relying on hard copy disclosures can still find all the relevant information in a reasonable manner.

Hyperlinks can also vastly improve the navigation of corporate filings but it is essential that any linked information is treated as "filed with the SEC" for the purposes of legal liability. Additionally, any information that is linked within corporate filings must be stored in EDGAR and readily accessible to investors. External websites and servers are subject to changes outside of the control of the Commission, thus linking to them would jeopardize the reliability and fidelity of the Commission's records. For the same reasons, the SEC should not allow "filed" information to be housed solely on company websites.

⁷⁵ *Report on Review of Disclosure Requirements in Regulation S-K*, Staff of the U.S. Securities and Exchange Commission (December 2013) p26. Available at: <https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf>.

Structured data perhaps offers the greatest potential to improve access to information and analysis of our markets. The Commission should increasingly drive registrants towards submitting data in a structured or tagged format. This would enable analysis by investors and third parties that could provide entirely new insights into our markets. It could provide regulators and investors alike with new warning signals or signs of abuse or fraud. The potential of “big data” should not be underestimated and cannot be fully leveraged without consistent line-item disclosures and structured or tagged data.

We also support the Center for Audit Quality’s suggestions for improving the search functions on EDGAR.⁷⁶ Increasing searchability will improve investors’ access to information by providing additional avenues for investors to reach that information. Ensuring that investors have the best possible access to relevant information is essential to the proper functioning of our capital markets.

There is much efficiency to be gained through use of the internet and electronic delivery. However, to protect the interests of investors who rely on paper delivery, the SEC should allow for investors to opt-in to e-delivery. This has the potential to save companies money without jeopardizing the interests or access of investors who depend on non-electronic access to information.

While some steps have been taken to facilitate the presentation of interactive data on SEC.gov, there are substantial opportunities to deliver continued improvement. Understanding and incorporating the growing body of scholarship around user experience would dramatically improve the utility of corporate reporting.

As others have noted, some information lends itself well to graphic presentation. Where possible, reporting companies should use graphics to communicate key trends and practices to investors quickly and clearly. However, those infographics must also be searchable. All reporting companies should be encouraged to present information in alternative formats to support reaching (and effectively communicating with) the broadest possible set of investors.

The potential for technology, properly leveraged, to revolutionize corporate reporting is real. We urge the SEC to embrace this opportunity and seek out new,

⁷⁶ Center for Audit Quality letter to the SEC, “Re: The SEC’s Disclosure Effectiveness Initiative – EDGAR Modernization Suggestions” (May 29, 2015). Available at: <https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness-40.pdf>.

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creative approaches to presenting information. Investors and regulators alike would benefit greatly from real time access to comparable, searchable and sortable data.

In conclusion, we urge the SEC to take this opportunity to improve the quality and quantity of information available to investors and to push back on efforts from the issuer community to reduce the information available to investors. If we can provide any other information please contact Corey Klemmer at (202)637-5379 or cklemmer@afcio.org.

Sincerely,

A handwritten signature in black ink, appearing to read "HSC", with a long horizontal flourish extending to the right.

Heather Slavkin Corzo, Director
Office of Investment

HSC/sdw
opeiu #2, afl-cio



AFL-CIO

AMERICA'S UNIONS

**American Federation
of Labor and
Congress of Industrial
Organizations**

815 16th St., N.W.
Washington, D.C. 20006
202-637-5000
www.aflcio.org

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Lonnie R. Stephenson
Richard Lanigan
Robert Martinez

July 22, 2016

Patrick T. Tierney
Assistant Director
Office of the Comptroller
of the Currency
400 7th Street S.W.
Washington, D.C. 20219

Robert deV. Frierson
Secretary
Board of Governors of the
Federal Reserve System
20th Street and
Constitution Ave. N.W.
Washington, D.C. 20551

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance
Corporation
550 17th Street N.W.
Washington, D.C. 20429

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
400 7th Street S.W., Eighth Floor
Washington, D.C. 20219

Gerard S. Poliquin
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549

Submitted electronically via www.regulations.gov

Re: Incentive-Based Compensation Arrangements

Dear Messrs. Tierney, Frierson, Feldman, Pollard, Poliquin and Fields:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I appreciate the opportunity to comment on the proposed rule that has been jointly developed by the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Federal Housing Finance Agency, the National Credit Union Administration, and the Securities and Exchange Commission (the "Agencies") on incentive compensation arrangements at financial institutions as mandated by Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

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The AFL-CIO is the umbrella federation for U.S. labor unions, including 56 unions representing 12.5 million members. Union-sponsored and Taft-Hartley pension and employee benefit plans hold more than \$646 billion in assets. The retirement savings of working people depend, in part, on financial institutions having responsible compensation practices for their executives and other employees. Moreover, working people suffered devastating losses from the Wall Street financial crisis not just as savers for retirement, but also as employees, homeowners, and taxpayers.

The Financial Crisis Inquiry Commission described how incentive compensation practices at financial services companies helped to create the Wall Street financial crisis. Compensation practices “encouraged the big bet—where the payoff on the upside could be huge and the downside limited. This was the case up and down the line—from the corporate boardroom to the mortgage broker on the street.”¹ For this reason, the AFL-CIO strongly supports the efforts of the Agencies to ban incentive pay that encourages inappropriate risk-taking at financial institutions.

We commend the Agencies for strengthening the proposed rule to implement Section 956 of the Dodd-Frank Act. The 2016 re-proposed rules have been significantly improved compared to the originally proposed version in 2011 that lacked meaningful constraints on incentive compensation at financial services companies. However, as described below, we urge the Agencies to revise the final rule to better regulate incentive compensation at financial services companies.

Covered Employees

We are pleased that the Agencies have expanded the scope of the proposed rule to go deeper down into the organizational hierarchy. The 2011 proposal covered only named executive officers and heads of major business lines, and gave the boards of directors the discretion to identify employees such as traders who could cause financial institutions to suffer large losses. The 2016 re-proposed rule extends coverage to senior executive officers (“SEOs”) who perform certain functions, as well as significant risk-takers (“SRTs”) who could risk a financial institution’s safety and soundness.

We believe that extending mandatory coverage of the proposed rule to SRT compensation could help prevent a repeat of the 2012 “London Whale” incident in which a trader in the London office of JPMorgan Chase caused the bank to lose more than \$6 billion through risky trades, and resulted in the bank paying \$1 billion in fines for violations of securities laws.² Nonetheless, we believe that the proposed test for

¹ The Financial Crisis Inquiry Report, Financial Crisis Inquiry Commission, January 2011, at xix. Available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_conclusions.pdf

² Jenny Strasburg, *Former J.P. Morgan Executive Fined Over \$1 Million by U.K. Regulator for ‘London Whale’ Trades*, The Wall Street Journal, February 9, 2016.

determining who are SRTs is too narrow, and that the definition should be expanded to more broadly encompass risk takers at financial institutions.

Deferral Periods

We urge the Agencies to strengthen the required deferral periods for incentive compensation. As proposed, the most stringent deferral requirements only require deferral of 60 percent of incentive pay awards for CEOs at the largest financial institutions. Within two years of the conclusion of the applicable performance period, 70 percent of short term incentive pay and 100 percent of long term incentive pay will vest under the proposed rules. These mandatory deferral periods should be lengthened to at least five years to better reflect performance over an entire business cycle.

Moreover, a substantial portion of incentive pay should be required to be held through retirement age. We note that many financial institutions have voluntarily adopted such holding requirements for their senior executives' equity awards. Bank of America, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, and Wells Fargo require that senior executives hold 50 percent of all net shares that they receive from equity awards through retirement. The Agencies risk undermining these holding requirements by proposing less rigorous mandatory deferral periods.

Asymmetric Pay

We reiterate our strong opposition to the use of stock options for incentive pay, particularly at financial institutions.³ Stock option grants are inherently asymmetrical in their payout structure because they provide all of the benefit of share price increases with none of the risk of share price declines. Stock options also reward stock price volatility – a measure of risk. For example, during the Wall Street financial crisis, many executives received stock option grants at depressed prices. These executives then profited handsomely when stock prices rebounded to previous levels.⁴

For these reasons, we are puzzled as to why the Agencies propose limiting stock options to 15 percent of deferred pay instead of proposing an outright ban on the use of stock option compensation. We note that many financial services companies have already moved away from stock options. The proposal acknowledges that out of 14 large financial institutions surveyed, only two institutions awarded stock options as part of their incentive compensation packages in 2015. If stock options encourage excessive risk-taking, why should they be permitted at all?

³ AFL-CIO comment letter, May 31, 2011. Available at: <https://www.sec.gov/comments/s7-12-11/s71211-705.pdf>

⁴ Scott Thurm, *Options Given During Crisis Spell Large Gains for CEOs*, The Wall Street Journal, April 26, 2011.

We also urge the Agencies to require that incentive pay be more aligned with the interests of bondholders, depositors, and taxpayers. Equity compensation alone encourages moral hazard because equity holders do not suffer the full costs of a bank failure. To remedy this asymmetry, CEOs and SRTs could be required to hold loss-absorbing capacity bonds. Aligning the self-interest of CEOs and SRTs with the interests of bondholders, depositors, and taxpayers will motivate CEOs and SRTs to maintain the safety and soundness of their financial institutions.⁵

Acceleration of Awards

We commend the Agencies for proposing a ban on the accelerated vesting of deferred pay except in the case of death or disability. The proposed rule correctly identifies the acceleration of awards as a risk factor because it reduces the long-term incentives of deferral and eliminates the possibility of forfeiture. However, we believe the prohibition on accelerated awards should apply to all incentive pay, not just to deferred amounts. Executives who voluntarily resign—for example to enter into government service—should not be entitled to accelerated or continued vesting of compensation that otherwise would be forfeited.

Hedging

As with stock options, we are puzzled by the Agencies' acknowledgement that hedging by CEOs and SRTs may undermine the effect of risk-balancing mechanisms, but then fail to ban CEOs and SRTs from individually hedging their own deferred compensation. Hedging of executive stockholdings was common leading up to and during the financial crisis. For example, more than a quarter of Goldman Sachs' partners employed hedging strategies between July 2007 and November 2010.⁶

The Agencies should strengthen the final rule by prohibiting CEOs and SRTs from engaging in personal hedging strategies. Many financial institutions already prohibit hedging by their employees. For example, JPMorgan Chase employees are banned from hedging of unvested restricted stock units and performance share units, as well as unexercised options or stock appreciation rights. The firm's operating committee members cannot hedge any shares owned outright or through deferred compensation.⁷

⁵ Bebchuk, Lucian A. and Spamann, Holger, *Regulating Bankers' Pay* (October 1, 2009). *Georgetown Law Journal*, Vol. 98, No. 2, pp. 247-287, 2010. Available at <http://georgetownlawjournal.org/articles/regulating-bankers-pay/>

⁶ Eric Dash, *Stock-Hedging Lets Bankers Skirt Efforts to Overhaul Pay*, *The New York Times*, February 5, 2011.

⁷ 2016 Proxy Statement (Form DEF 14A), JPMorgan Chase, April 7, 2016, p. 37.

Forfeiture and Clawback

The proposed rule requires systemically important financial institutions *to consider* forfeiture and clawback of incentive pay under certain circumstances, but does not mandate it. Such policies should be mandatory, and financial institutions should be required to publicly disclose the identities of CEOs and SRTs from whom pay has been forfeited or clawed back, and the amounts in question. Moreover, deferred compensation arrangements should contain a forfeiture provision to ensure a recovery in the event that previously transferred compensation becomes subject to a clawback.

Effective Date

Finally, we believe a 540-day transition period is unnecessarily generous for financial services companies to implement the rules after they are finalized. Section 965 of the Dodd-Frank Act required the Agencies to issue these rules within nine months after its passage. Six years later, the Agencies have still not issued a final rule. The financial services industry has long known that this rule is coming, and we believe that implementation should be required within 365 days after the rule is finalized.

Conclusion

We support the improvements that have been made in the Agencies' re-proposed rule, but believe that the final rule needs to go further to protect the financial system from incentive compensation that can promote excessive risk-taking. We appreciate the opportunity to comment on this important rulemaking. If the AFL-CIO can be of further assistance, please contact me at (202) 637-5318.

Sincerely,



Heather Slavkin Corzo,
Office of Investment

HSC/sdw
opeiu #2, afl-cio

American Federation of Labor and Congress of Industrial Organizations



815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

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September 14, 2015

Sent via Electronic Mail: rule-comments@sec.gov

Mr. Brent J. Fields, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: File Number S7-12-15 Listing Standards for
Recovery of Erroneously Awarded Compensation**

Dear Mr. Fields:

On behalf of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), I am writing to comment in support of the U.S. Securities and Exchange Commission ("SEC") proposed rule to establish stock exchange listing standards to require the recovery of erroneously awarded executive compensation. We urge the SEC to strengthen the final rule by requiring the application of clawback forfeiture provisions to senior executives' deferred compensation, and to expand the required use of clawbacks to cover executive wrongdoing, financial statement revisions, and the value of equity awards that have been artificially inflated.

The AFL-CIO is the umbrella federation for U.S. labor unions, including 56 unions, representing 12.5 million union members. Union-sponsored and Taft-Hartley pension plans hold \$587 billion in assets. Union members also participate directly in the capital markets as individual investors and as participants in pension plans sponsored by corporate and public-sector employers. The retirement savings of America's working families depend, in part, on companies having responsible executive pay practices.

Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the establishment of clawback provisions for erroneously awarded executive compensation in the event of an accounting restatement. As the SEC has noted, Congress intended this provision to go beyond Section 304 of the Sarbanes-Oxley Act that requires executive pay clawbacks after a material restatement due to CEO or CFO

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September 14, 2015
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misconduct. In contrast, Section 954 of the Dodd-Frank Act intends for all executives to be subject to clawback irrespective of the individual fault of executives.

The scope of the SEC's proposed clawback rule is in accordance with the legislative intent of Section 954 of the Dodd-Frank Act. Specifically, the SEC's proposed rule requires that companies to clawback compensation regardless misconduct or fault. Dodd-Frank Section 954 requires – and common sense suggests – that executives should be required to repay compensation that they did not actually earn. It does not matter if a restatement was caused by the executive, all that matters is whether the executive actually met the performance requirements in question.

Likewise, the SEC's proposed clawback rule appropriately covers all Section 16 executive officers, including the principal financial officer and the principal accounting officer. Section 954 of the Dodd-Frank Act simply refers to executive officers, and it makes sense for the SEC to apply the clawback rule to a clearly identified group of executives under existing securities regulations. Any narrower definition of executives who are subject to clawback (such as the top five highest compensated "named executive officers" in proxy statements) would be contrary to the interests of investors.

We support the SEC's proposed application of the clawback rule to all publicly listed companies including emerging growth companies, smaller reporting companies, foreign private issuers, and controlled companies. Investors in these categories of issuers deserve the same protections as investors in large publicly traded companies. Likewise, we support the SEC's proposed ban on indemnification agreements for clawbacks. As the SEC proposal notes, permitting companies to indemnify their executives would fundamentally undermine the purpose of Dodd-Frank Section 954.

We support the SEC's proposed requirement that companies disclose the aggregate dollar amounts of executive compensation that was erroneously awarded and the status of recovery. We urge the SEC to improve the final rule by requiring that when a clawback is triggered, the identities of named executive officers and their dollar amounts of compensation subject to clawback should be disclosed in the proxy statement. Such disclosure should be required because shareholders regularly evaluate named executive officer compensation as part of their say-on-pay vote determination.

In our view, boards of directors should not be given discretion to decline to seek recovery of erroneously awarded compensation. Dodd-Frank Section 954 explicitly states that "the issuer will recover" improperly awarded compensation. To effectuate this legislative intent and to facilitate recovery, companies should be required establish a clawback forfeiture provision in their executives' nonqualified deferred compensation plans. Given the fungibility of assets, the assets subject to clawback do not necessarily have to be the same assets that were erroneously awarded as compensation.

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For equity awards, clawbacks should not be limited to such awards that are granted based on satisfaction of a financial reporting measure. Time-vested stock options and restricted stock are still the predominate form of equity-based incentive pay. Dodd-Frank Section 954 explicitly requires recovery of “stock options awarded as compensation,” and this phrase should be interpreted to include the value of stock option exercises that are artificially inflated due to erroneous financial statements. To effectuate such a clawback, boards of directors should be permitted to make reasonable estimates of the effect of the accounting restatement on the stock price.

We also believe that clawbacks should not be limited to material restatements of previously issued financial statements. In recent years, an increasing percentage of restatements have been “revision restatements” that do not require an Item 4.02 Form 8-K disclosure. These “stealth restatements” should also be subject to clawback provisions. Executives should not be permitted to retain erroneously awarded compensation just because the board of directors has determined that the amendment is not sufficiently material to make the prior financial restatement unreliable.

Finally, we urge the SEC to expand the clawback rule to address instances of misconduct by executives that does not result in a financial restatement. While such a provision goes beyond the legislative requirements of Dodd-Frank Section 954, investors will benefit from robust clawback provisions that cover wrongdoing by individual executives. While the triggering of such clawbacks is likely be infrequent, having clawback policies in place for misconduct will provide further incentive for executives to comply with the law. The SEC should also require disclosure of any board of directors’ determination that a clawback for misconduct is required.

Thank you for the opportunity to comment on the SEC’s proposed rule to establish stock exchange listing standards for the recovery of erroneously awarded compensation. Executives of publicly traded companies simply should not be permitted to retain compensation that they did not actually earn, and the SEC’s proposed clawback rule will go a long way to make this a reality. If we can provide any additional information on the AFL-CIO’s views, please contact Brandon Rees at 202-637-5152.

Sincerely,



Heather Slavkin Corzo, Director
Office of Investment

HSC/sdw
opeiu #2, afl-cio

American Federation of Labor and Congress of Industrial Organizations



815 Sixteenth Street, N.W.
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D. Taylor
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Harry Lombardo
Sara Nelson

June 30, 2015

Sent via electronic mail: rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Pay Versus Performance Rule, File No. S7-07-15

Dear Mr. Fields:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I am writing to provide comments to the Securities and Exchange Commission (the "SEC") on the proposed pay-versus-performance rule. Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") requires the SEC to issue this rule for public companies to disclose the relationship between executive compensation and company performance.

The AFL-CIO is the umbrella federation of U.S. labor unions, including 56 unions, representing 12.5 million union members. Union-sponsored and Taft-Hartley pension plans hold more than \$560 billion in assets. Union members also participate directly in the capital markets as individual investors and as participants in pension plans sponsored by corporate and public-sector employers. The retirement savings of America's working families depend, in part, on ensuring that public companies have responsible compensation practices for their chief executive officers.

Overall, we are supportive of the SEC's proposed rule which adds item 402(v) of Regulation S-K, requiring companies to disclose pay-versus-performance data for the principal executive officer and other named executive officers in a new standardized table in proxy statements. The proposed disclosure requirement will give investors a valuable new tool for reviewing the relationship between the compensation actually paid to senior executives and their company's total shareholder return.

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Pay-versus-performance tables—along with disclosure of the ratio of the CEO-to-worker pay, as mandated by Section 953(b) of the Dodd-Frank Act—will provide shareholders with information that will help them assess a company’s executive compensation when casting advisory Say-on-Pay votes. As the legislative history of the Dodd-Frank Act suggests, this disclosure will also aid shareholders in elections of directors, especially compensation committee members, by helping them evaluate the directors’ oversight of executive compensation.¹

“Actually Paid” Compensation

We agree with the SEC’s proposal that “executive compensation actually paid” should include all compensation actually paid, regardless of whether it is specifically linked to a company’s performance. As we noted in our August 8, 2014 comment letter, we believe that the inclusion of all forms of executive compensation in total amounts will help investors better understand the relationship between executive pay and company performance, or the lack thereof.² Excluding some forms of executive compensation from pay totals because they are not linked to performance would defeat the entire purpose of the pay-for-performance table disclosure requirement.

Alternative total pay methodologies such as a “realized pay” approach will not satisfy the definition of “executive compensation actually paid” as mandated by Section 953(a) of the Dodd-Frank Act. By including stock price appreciation of equity awards after vesting, a “realized pay” approach would conflate changes in executives’ wealth with their income. Equity awards cannot be considered “actually paid” upon exercise because executives decide how and when to exercise their awards after they are vested. For this reason, the proposed definition of “actually paid” compensation appropriately focuses on the fair value of awards on the vesting date.

Summary Compensation Table Total Compensation

We commend the SEC for preserving the Summary Compensation Table in its current form under Item 402 of Regulation S-K, and for including the total compensation from the Summary Compensation Table in the new pay-versus-performance table. The Summary Compensation Table informs investors of the total compensation granted to senior executives in the latest fiscal year, including the fair value of equity awards. This helps shareholders evaluate the annual compensation decisions made by boards of

¹ *Report on The Restoring American Financial Stability Act of 2010*, Senate Committee on Banking, Housing and Urban Affairs, April 30, 2010. At 135. Available at:

http://www.banking.senate.gov/public_files/Comittee_Report_S_Rept_111_176.pdf

² AFL-CIO comment letter to the SEC, August 8, 2014. Available at: <http://www.sec.gov/comments/df-title-ix/executive-compensation/executivecompensation-329.pdf>

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directors' compensation committees. For this reason, it is important that the Summary Compensation Table total amounts be listed in the pay-versus-performance table.

Measuring Company Performance

While we recognize that Total Shareholder Return ("TSR") is an important performance yardstick for investors, we urge the SEC to require disclosure of the quantitative performance metrics and numerical formulas that compensation committees are actually using to set executive pay. At the time that the Dodd-Frank Act was being debated in Congress, the Council of Institutional Investors urged lawmakers to require the disclosure of quantitative performance targets and thresholds for setting target pay.³ Since the Dodd-Frank Act became law, some, but not all companies, have begun disclosing their quantitative performance metrics for executive pay.⁴

Although the statutory language of Section 953(a) suggests that TSR should be included in pay-versus-performance tables, TSR is not the only measure of financial performance. In fact, TSR may not be a good measure of executive performance over the long term because many other factors impact TSR that are entirely outside the influence of executives. Investors need to be able to consider the quantitative performance metrics that are actually used to determine executive pay and whether those benchmarks are rigorous. To enhance comparability, these quantitative performance metrics should be required to be disclosed in a standardized format.

Graphic Representation of Pay-Versus-Performance

Additionally, we recommend the SEC require companies to present the pay-versus-performance data in a standardized graph showing the trend line for both the top executive and the other senior executives over the required time periods. We believe such a graph will be especially useful to investors if it shows the percentage change in executive compensation actually paid and the Summary Compensation Table total compensation compared with the company's TSR and peer group performance over each year of the required time period.

³ *Protecting Investors and Fostering Efficient Markets: A Review of the S.E.C. Agenda*, Hearing before the House Committee on Financial Services, statement of Ann Yerger, executive director of the Council of Institutional Investors, May 25, 2006.

⁴ For example, see Chesapeake Energy Corp., 2015 Proxy Statement, April 10, 2015 at 25; General Electric Co., 2015 Proxy Statement, March 10, 2015 at 38. Prudential Financial Inc., 2015 Proxy Statement, March 24, 2015, at 42-44; 47-49.

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Peer Group Total Shareholder Return

The peer group TSR disclosed in the pay-versus-performance table should be the same peer group used in determining executive compensation. If companies use more than one peer group to set executive pay, they should be required to disclose each peer group in the pay-versus-performance table. For example, a company may set target pay amounts using one peer group and use quantitative performance metrics from another peer group. If companies change their peer groups, they should be required to disclose the changes and explain the reasons for the change.

Separate Pay Disclosure for Different CEOs

If more than one individual serves as the principal executive or CEO during the fiscal year in question, companies should be required to separately disclose the pay-versus-performance data for each person. Combining the compensation of various CEOs, as proposed by the SEC, will hamper the ability of investors to correctly assess the performance of the different chief executives. Investors can easily combine the “actually paid” compensation amounts if a company lists more than one CEO in the table, but they cannot easily separate the aggregate pay of two or more CEOs.

XBRL Tagging

We support the SEC’s proposed requirement that the pay-versus-performance data be tagged in XBRL format. We believe that XBRL tagging of the relationship of executive compensation to financial performance will enhance the ability of investors to compare data across companies, and over time. Furthermore, XBRL tagging should be extended to the actual performance metrics that are being used to determine executive compensation. Such disclosure will facilitate proxy voting by institutional investors who often vote hundreds if not thousands of proxies each year.

We thank you for taking the AFL-CIO’s views into consideration regarding this matter. We look forward to speedy implementation by the SEC of the final rule on Section 953(a) of the Dodd-Frank Act. If the AFL-CIO can be of further assistance, please contact Brandon Rees at [REDACTED] or [REDACTED].

Sincerely,



Heather Slavkin Corzo
Director, Office of Investment